



Date: 03/14/2000

To: All Contractors

From: Charles Wilson
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Subject: Update on status of EEO Contract Compliance Program

This memo is to provide you with an update on the status of the Washington State Department of Transportation's (WSDOT) Equal Employment Opportunity (EEO) Contract Compliance Program administered by the Office of Equal Opportunity. WSDOT has made several changes to the EEO program following resolution of a recent contractor lawsuit.

Summary of the lawsuit:

On March 9, 1998, Superior Paving Company Inc. filed suit in United States District Court for the Eastern District of Washington against the Washington State Department of Transportation (WSDOT), the United States Department of Transportation (USDOT), and the Federal Highway Administration (FHWA) alleging that FHWA and WSDOT had administered the Equal Employment Opportunity program in an unconstitutional manner.

The parties reached a settlement agreement on January 20, 1999. The terms of the agreement are as follows:

- 1) WSDOT will continue to include the goals and timetables and good faith efforts set forth in 41 CFR (Code of Federal Regulations) Part 60-4 in all federal aid highway construction contracts.
- 2) WSDOT will not measure or enforce compliance with 41 CFR Part 60-4.
- 3) The Office of Federal Contract Compliance Programs (OFCCP) will be the only agency measuring or enforcing compliance with 41 CFR Part 60-4.
- 4) WSDOT will continue to enforce the US Department of Transportation's Equal Employment Opportunity regulations set forth in 23 CFR, Part 200.
- 5) WSDOT will not use the goals in 41 CFR Part 60-4 to measure or evaluate compliance with 23 CFR Part 230.

- 6) WSDOT will not establish any other numerical criteria or require contractors to give preference in hiring based on race or gender without first complying with constitutional requirements.
- 7) FHWA will provide its Region 10 with this agreement and to instruct the Region to rescind previous directives that are inconsistent with this settlement agreement.

On April 23, 1999, WSDOT requested from FHWA and USDOT policy guidance concerning implementation of the above settlement agreement. WSDOT, received the following response from FHWA and USDOT on August 2, 1999:

It is important to note that State Transportation Agencies (STAs) are still required to include in all Federal-aid contracts – either explicitly or by reference – the required contract language relating to equal employment opportunity and goals as set forth in 41 CFR Parts 60-1 and 60-4.

The FHWA Order affirms that the State Transportation Agencies (STAs) and FHWA continue to have responsibility to ensure compliance with and to enforce 23 U.S.C. and Title VI of the Civil Rights Act and related regulations, including 49 CFR 21 and 26, and 23 CFR Part 200, 230 and 633. These citations confirm the requirement for contractors to provide, States to obtain, and FHWA to ensure non-discrimination in employment and the selection and retention of subcontractors, material suppliers and vendors on all of their projects, and through the EEO provisions, provide for equal employment opportunity for minorities and women in all of their employment. If FHWA or an STA becomes aware of any possible violations of the EO 11246 or its implementing regulations, each has the responsibility to notify the DOL of such violations. The OFCCP may accept the findings of State or FHWA reviews or inspections conducted under Title 23, or conduct its own review or investigation. If non-compliance is determined and not corrected, OFCCP may find the contractor in non-compliance with the E.O. and issue an order to cancel or suspend existing contracts, debar the contractor nationwide, or refer the matter to the Department of Justice for further proceedings.

It is important to note that 23 CFR still requires reporting by STAs and contractors of sufficient information and data on which to base compliance determinations. FHWA believes that by eliminating the use of Form 86, Compliance Data Report, the STAs will have greater flexibility to develop localized approaches that will be more effective in assessing the impacts of contractors' efforts. The Order does not change any STAs obligation to develop a contract compliance program sufficient to determine, and where non-compliance is found, obtain compliance with Nondiscrimination, Equal Opportunity and EEO programs authorized under 23 U.S.C., 49 U.S.C., Title VI of the Civil Rights Act, and Transportation Efficiency Act for the 21st Century and implementing regulations.

The following is WSDOT's position towards each term of the settlement agreement:

- 1) **WSDOT will continue to include the goals and timetables and good faith efforts set forth in 41 CFR (Code of Federal Regulations) Part 60-4 in all federal aid highway construction contracts.**

WSDOT is required by federal law to include Executive Order (EO) 11246 and OFCCP's goals and timetables in all federally assisted contracts. Although this language is required to be in the contract, WSDOT will not measure or enforce compliance with the OFCCP established goals and timetables or its good faith effort criteria. Contract language will include a statement referencing enforcement of EO 11246 and subsequent goals and timetables will be set and enforced solely by OFCCP.

- 2) **WSDOT will not measure or enforce compliance with 41 CFR, Part 60-4.**

WSDOT will continue to enforce 23 CFR Parts 200, 230 and 633 as well as 49 CFR Parts 21 and 23. FHWA and WSDOT shall not make any determinations regarding compliance with EO 11246 or 41 CFR Part 60. If WSDOT becomes aware of any possible violations of EO 11246 or 41 CFR Chapter 60, it may notify the OFCCP.

- 3) **The Office of Federal Contract Compliance Programs (OFCCP) will be the only agency measuring or enforcing compliance with the goals and timetables and good faith effort defined in 41 CFR Part 60-4.**

Although WSDOT is required to incorporate the OFCCP goals and timetables into all contracts containing federal monies, WSDOT does not have the authority to enforce them. The goals and timetables are set and enforced only by OFCCP and are required to be included in all federal contracts. The contractor may, at any time, be reviewed by OFCCP who can, and will, enforce their goals. WSDOT also determines good faith effort under 23 CFR 230, subpart A, Appendix A, and 49 CFR.

- 4) **WSDOT will continue to enforce the Equal Employment Opportunity regulations set forth in 23 CFR, Part 200.**

WSDOT will monitor all federal aid projects to determine contractors compliance with the Equal Employment Opportunity requirements. WSDOT expects that contractors will demonstrate documented, targeted, ongoing and contract specific, good faith efforts to comply with the regulations and contract requirements. WSDOT will continue to review all required notices, documents, and employment applications. WSDOT will also review monthly Utilization Reports and certified payrolls to ensure that minority and female employees are provided equal employment opportunities. In addition, WSDOT will examine training opportunities in the workforce and will review new hire opportunities and job applications received by the contractor. WSDOT will also conduct on-site interviews of employees on the contract.

- 5) **WSDOT will not use goals to measure or evaluate compliance with 23 CFR Part 230.**

WSDOT will continue to verify good faith efforts and contact unsuccessful minority and female applicants to ensure non-discrimination. Compliance will be measured as defined in the contract and the 23 CFR 230.

- 6) **WSDOT will not establish any other numerical criteria or require contractors to give preference in hiring based on race or gender without first complying with constitutional requirements.**

The settlement agreement does not prohibit the use of other numerical criteria, so long as it is applied in a constitutional manner.

- 7) **FHWA has agreed to provide its Region 10 with this agreement and to instruct the Region to rescind previous directives that are inconsistent with this settlement agreement.**

FHWA has rescinded all previously issued EEO Contract Compliance guidance including the April 8, 1998 Region 10 Technical Advisory. New guidance consistent with the terms of this agreement will be issued by FHWA in a follow-up guidance memorandum and FHWA Order. Although the Memoranda of Understanding (MOU) established between FHWA regional offices and their regional OFCCP counterparts have been rescinded by the OFCCP, it is the understanding of the U.S. Department of Transportation Federal Highway Administration that the national MOU between the DOT and DOL dated December 7, 1997, remains effective. Negotiations have begun with OFCCP representatives to update, clarify, and in light of recent events, enhance the relevance of the MOU. In the interim, FHWA is requested to work with the WSDOT to carry out the provisions of this MOU with respect to the

cooperation and exchange of information with the OFCCP to eliminate any duplication of effort by OFCCP and FHWA to ensure that federally assisted construction contractors are meeting the Federal EEO statutes and regulations.

WSDOT will begin conducting EEO Compliance reviews in December, 1999, pursuant to 23 CFR part 230 and the new guidance provided by FHWA. WSDOT is currently sending letters of congratulations to successful bidders with the names and number of all External Civil Rights Programs personnel and offering our assistance in any area necessary. WSDOT sincerely wants to assist all contractors in their efforts to obtain and/or maintain EEO compliance, with our commitment to do whatever is requested of us providing quality customer service. In this regard, Equal Employment Opportunity (EEO)/On-the-Job Training (OJT) and OJT Supportive Services staff will be conducting workshops around the state for WSDOT personnel (including Highways and local Programs), Subrecipients of federal financial assistance, and contractors. These workshops will address all of the changes to the EEO program. (Small workshops may also be conducted as requested.)

Should you have any questions regarding this information please feel free to call Mr. Charles Wilson at (360) 705-7085 or Ms. Bonnie Blake at (360) 705-7082.